PD-0325-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/24/2020 5:03 PM
Accepted 9/25/2020 9:36 AM
DEANA WILLIAMSON
CLERK

No. PD-0325-20

FILED
COURT OF CRIMINAL APPEALS
9/25/2020
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AT AUSTIN

THE STATE OF TEXAS, APPELLANT

V.

DUKE EDWARD, APPELLEE

FROM THE 14TH COURT OF APPEALS OF TEXAS AT HOUSTON

CAUSE NO. 14-18-00302-CR

STATE'S BRIEF ON THE MERITS

Jack Roady
Criminal District Attorney
Galveston County, Texas

Counsel of Record: Holly Renee Magee
Assistant Criminal District Attorney
Bar I.D. No. 12812300
600 59tth Street, Suite 1001
Galveston, Texas 77551
(409)776-2452(telephone)
(409) 765-3132 (FAX)
Renee.magee@co.galveston.tx.us

Attorneys for the State of Texas

ORAL ARGUMENT NOT GRANTED

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the Trial Court's judgment are the State of Texas and Duke Edward.

*The case was tried before the Honorable Patricia Grady, 212th District Court, Galveston County, Texas.

*Counsel for Appellee at trial was Calvin Parks, 1120 Broadway, Suite 2743, Pearland, Texas 77584.

*Counsel for Appellee on appeal was James Ducote, at 3027 Marina Bay Drive, Suite 226, League City, Texas 77573.

*Counsel for the State at trial was Patrick Gurski and Colton Turner, Assistant Criminal District Attorney, 600 59th Street, Suite 1001, Galveston, Texas 77551.

*Counsel for the State on appeal is Renee Magee, Assistant Criminal District Attorney, 600 59th Street, Suite 1001, Galveston, Texas 77551.

*Counsel for the State before this Court is Renee Magee, Assistant Criminal District Attorney, 600 59th Street, Suite 1001, Galveston, Texas 77551.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

NO. PD-0325-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS AT AUSTIN

THE STATE OF TEXAS	§	**APPELLANT**
V.	§	
DUKE EDWARD	§	**APPELLEE**

STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Fourteenth Court of Appeals reversed Appellee's conviction for assault causing bodily injury to a family member. In doing so, the appellate court applied its own determination of credibility to two witnesses who testified the victim had identified Appellee as her boyfriend. May a reviewing court ignore deference to a factfinder's credibility assessment and standard of review in reversing a conviction for assault causing bodily injury to a family member? May the Court of Appeals ignore its own precedent and central concepts of appellate review including: the standard of review and deference to the factfinder's credibility assessment in order to find insufficiency of the evidence?

STATEMENT OF THE CASE

Appellee, Duke Edward, pleaded not guilty to the offense of assault causing bodily injury to a family member. A jury decided both the guilt-innocence and punishment phases of the trial. Appellee was found guilty and sentenced to sixty years confinement in the Texas Department of Criminal Justice. Appellee presented one point of error on appeal, sufficiency of the evidence as to the element of "family member" defined by Texas Family Code §71.0021(b).

In a three judge panel with one justice dissenting, the Fourteenth Court of Appeals agreed with appellee's sole point addressing the sufficiency of the evidence as to the element of "family member" as a "dating relationship" under Texas Family Code sec. 71.0021(b). On March 26, 2020, the appellate court reversed appellee's conviction in an unpublished opinion and remanded to the trial court with instructions to reform the judgment to be a Class A misdemeanor conviction and conduct a new punishment hearing. *Edward v. State*, No. 14-18-00302-CR, 2020 WL 1480221 (Tex. App. –Houston [14th Dist.] March 26, 2020). This Court granted the State's Petition for Discretionary Review on September 16, 2020. The State now files this brief on the merits urging reversal of the decision of the Court of Appeals.

ISSUE PRESENTED

What is the standard of review for a directed verdict and for sufficiency of the evidence? Did the Court of Appeals fail to give deference to the factfinder on credibility

issues and fail to review the evidence in the light most favorable to the verdict in resolving conflicts in testimony? Did the Court of Appeals review the issue in a manner that so far departed from the accepted and usual course of judicial proceedings as to call for a reversal of their opinion by the Court of Criminal Appeals?

The crux of the lower appellate court's opinion is that the trial court erred when it denied appellee's motion for directed verdict because, they opined, there was legally insufficient evidence that appellee was in a dating relationship with the complainant.[1] What concerns the State is that the lower appellate court overlooked long-standing precedent, including its own, to reach this conclusion.

STATEMENT OF FACTS

The victim in this case, Maggie Bolden, made an emergency 911 phone call to report a disturbance at her apartment.[2] The responding officer, Richard Hernandez with La Marque Police Department, was dispatched to the victim's residence.[3] When Officer Hernandez knocked on the apartment door, the victim immediately opened the door and exited.[4] The victim was hysterical and crying.[5] She appeared injured on her

[1] *See attachment: Plurality Opinion, Edward v. State, No. 14-18-00302-CR, 2020 WL 1480221 (Tex. App. –Houston [14th Dist.] March 26, 2020).*
[2] RR III, at 13, 14.
[3] RR III, at 13.
[4] RR III, at 13.
[5] RR III, at 14.

face and had blood on her shirt and face.[6] Officer Hernandez testified he asked her "What's going on" and she stated that "her boyfriend had beat her up."[7] She said he was still inside the residence.[8] Maggie Bolden did not testify due to the State's inability to locate her.[9] Her statements were objected to at trial, but admitted as an excited utterance through Officer Hernandez,[10] the bodycam video[11] and the 911 call.[12] Neither the bodycam video or the 911 call mentioned the word "boyfriend."[13]

After Officer Hernandez spoke to the victim, he called for the suspect to exit the apartment, but no one answered.[14] Officer Hernandez entered the apartment and found a man, later identified as Duke Edward, in the direction the victim had pointed.[15] Edward was sitting on a bed in the victim's bedroom.[16] No injuries were observed on Edward.[17] No other person was in the apartment.[18] Bolden identified Edward as the person who assaulted her.[19] Officer Hernandez testified that he told the victim to go to the hospital

---

[6] RR III, at 14.
[7] RR III, at 14.
[8] RR III, at 15.
[9] RR III, at 9.
[10] RR III, at 14.
[11] RR III, at 16; *see* State's Ex.2.
[12] RR III, at 6; *see* State's Ex.1.
[13] RR III, at 20, 21.
[14] RR III, at 15.
[15] RR III, at 15.
[16] RR III, at 15.
[17] RR III, at 16.
[18] RR III, at 25.
[19] RR III, at 20.

and gave her a family violence form, which she signed.[20]

On cross examination, Officer Hernandez testified he had not spoken to the leasing office to see if the appellee lived at the apartment.[21] Officer Hernandez also admitted that he was unaware who started the disturbance or if Edward had been struck first by the victim.[22] Officer Hernandez testified that he did not observe any evidence at the scene to indicate that a weapon had been used against Edward.[23] Officer Hernandez testified that the victim did not identify Edward as her "boyfriend" on the body camera video[24] or the 911 recording,[25] both of which were admitted into evidence by the State, but she did at some point during their contact.[26] Officer Hernandez testified the video didn't show everything, that some of it was taken out.[27]

Officer Hernandez testified that before he left the scene, he gave the victim a family violence form, which she signed.[28]

Licensed paramedic for La Marque, emergency medical technician Amanda Black, testified she was dispatched to the crime scene.[29] She remembered the victim as having

---

[20] RR III, at 18.
[21] RR III, at 23.
[22] RR III, at 28.
[23] RR III, at 28.
[24] RR III, at 20, 21.
[25] RR III, at 20.
[26] RR III, at 20.
[27] RR III, at 26 (the record reflects a portion of the bodycam video, which was redacted, depicted the officer talking about how the victim had told him her husband or boyfriend beat her up).
[28] RR III, at 18.
[29] RR III, at 31.

been beaten badly and she checked her out.[30] Black observed multiple lacerations, or cuts, all over the victim's face and multiple contusions across her forehead.[31] Black testified that these injuries could only be sustained from multiple strikes.[32]

On direct examination, Black said she spoke with the victim, who told her that her "boyfriend" beat her up,[33] that she was hit with his fist and kicked in the back, and she was hit in the face.[34] Black asked the victim if she was in pain.[35] She asked "on a scale of 1- to 10, 10 being the worst pain ever felt in your life, 1 being no pain at all" what is your pain level?[36] The victim told Black that she was "10 out of 10."[37]

Black observed physical injuries on the victim's face and head which were consistent with the victim's descriptions of the assault.[38] This evidence was admitted over objection based upon the representation that it was made for medical diagnosis.[39] Subsequently, the State offered the emergency medical report through this same witness.[40] The record indicated the victim had identified Edward Duke as her boyfriend, but the word ""boyfriend" was redacted because Black, the paramedic testifying, had not

[30] RR III, at 31.
[31] RR III, at 34.
[32] RR III, at 34.
[33] RR III, at 31.
[34] RR III, at 32.
[35] RR III, at 33.
[36] RR III, at 33.
[37] RR III, at 33.
[38] RR III, at 34.
[39] RR III, at 31.
[40] RR III, at 41.

prepared the report.[41]

The defense objected to the records and conducted a voir dire examination of the witness.[42] During the voir dire examination, Black stated that her partner, James Matthews, wrote the report and she did not remember if the victim told her or Matthews that appellant was her boyfriend.[43] The records were admitted with the relationship status redacted.[44]

On cross examination, Black testified that following her medical evaluation of the victim, she felt no bones were broken, the victim had not lost consciousness,[45] and the victim was taken to Mainland Center Hospital.[46] Black testified she did not evaluate Duke Edward for injuries at the scene,[47] and she had no personal knowledge of how the disturbance took place.[48] Black testified she had no firsthand information concerning the relationship between the victim and appellant and that she received her information from the medical report prepared by James Matthews.[49]

Additionally, Edward stipulated to evidence that he had previously been convicted of an assault family violence.[50]

---

[41] RR III, at 5, 39.
[42] RR III, at 38, 39.
[43] RR III, at 38, 39.
[44] RR III, at 39.
[45] RR III, at 43.
[46] RR III, at 44.
[47] RR III, at 44.
[48] RR III, at 44.
[49] RR III, at 43, 44.
[50] RR III, at 49.

At the close of the evidence, Edward's attorney moved for a directed verdict based on his perceived failure of the State to prove that the appellee and the victim were in a dating relationship.[51] The motion was denied.[52]

The jury convicted appellee of felony assault of a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code.[53] After hearing punishment evidence, which included two prior felony convictions in sequential order, the jury sentenced appellee to 60 years in the Texas Department of Criminal Justice-Institutional Division.[54]

SUFFICIENCY OF EVIDENCE LAW

A challenge to the denial of a motion for a directed verdict is a challenge to the legal sufficiency of the evidence.[55] In reviewing the sufficiency of the evidence to support a conviction, the appellate court must consider all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[56] All of the evidence in the record should be considered in the review, whether admissible or

[51] RR III, at 48, 50.
[52] RR III, at 49.
[53] RR III, at 72.
[54] RR IV, at 47.
[55] *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
[56] *Jackson v. Virginia*, 443 U.S. 307, 319 (1973); *Johnson v. State*, 364 S.W.3d 292, 293-94 (Tex. Crim. App. 2012).

inadmissible.[57] The sufficiency of the evidence supporting a conviction should be measured by comparing the evidence presented during the trial to the elements of the offenses as defined in a hypothetically-correct jury charge.[58]

The jury is the sole judge of the credibility of witnesses and the weight afforded their testimony.[59] The factfinder may choose to believe or disbelieve all or a portion of a witness' testimony, and the reviewing court should presume that the factfinder resolved any conflicts in the testimony reasonably based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict evidence in favor of the prevailing party.[60]

Circumstantial evidence is as probative as direct evidence in establishing the elements of the case.[61] Evidence is sufficient if the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict.[62] Further, the jury's verdict will

---

[57] *Price v. State*, 502 S.W.3d 278, S.W.3d 281 (Tex. App. –Houston [14th Dist.] 2016, no pet.) (citing *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013)).
[58] *Hernandez v. State*, 556 S.W.3d 308, 312 (Tex. Crim. App. 2017).
[59] *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012).
[60] *See Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016) ("We defer to the jury's finding when the record provides a conflict in the evidence."); *Jackson v. State*, 495 S.W.3d 398, 405 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd.).
[61] *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).
[62] *Wise v. Sta*te, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012).

be upheld unless "a rational factfinder must have had a reasonable doubt as to any essential element."[63]

The State agrees with the plurality opinion as to the standard of review, however, the State disagrees with the plurality opinion as they applied the law to the facts of the present case. The State agrees with the dissenting opinion of Justice Christopher, stating:

> "In reaching the opposite conclusion that the evidence is insufficient to support the conviction, the plurality asserts that the jury "could do no more than speculate on the existence of a dating relationship." This assertion is wrong because speculation does not occur if the jury is capable of "considering other facts and deducing a logical consequence from them."[64] And here, the officer testified that he gave the complainant a "family violence form" when he left the scene. This testimony—which the plurality wholly disregards in its sufficiency analysis—bolsters the evidence that the complainant identified appellant as her "boyfriend" and supports a logical inference that she informed the officer that she and appellant were involved in a dating relationship.[65]

In discussing conflicting testimony upon which the jury resolved the conflict in favor of the State and upon which the plurality based its reversal, the dissenting opinion states:

> The plurality also asserts that the jury was required to disregard the officer's initial testimony that the complainant

[6363] *Laster v. State*, 275 S.W. 3d 512, 518 (Tex. Crim. App. 2009).
[64] *See Hooper,* 214 S.W.3d at 16.
[65] *See Attachment: Edward, No. 14-18-00302-CR, 2020 WL 1480221 *3, Christopher, J., dissenting.*

> had identified her assailant as her "boyfriend" because the officer subsequently admitted the complainant had made no such identification **on the body cam video**. This analysis fails to recognize that the body cam video did not capture the entire interaction. The video was less than 15 minutes in length, and it ended when the officer was still in the complainant's apartment, as he was documenting her injuries. The jury could have reasonably concluded that the complainant identified appellant as her boyfriend after the body cam had stopped recording.[66]

The plurality seems to be of the opinion that the police officer was not credible in his assertion that the complainant identified appellee as her boyfriend, and has therefore extrapolated that none of the other evidence was credible either. They assert that the paramedic's testimony must be dismissed because her testimony was contradicted on cross examination. The paramedic said she got her information on the case from reading the report which was prepared by her partner, who was not present at the trial.[67] Even though Black's testimony regarding the relationship was hearsay, it was clearly admitted and all evidence should be considered, whether admissible or not.[68]

The dissent addressed the jury's resolving conflicts in the following argument:

> In a similar point, the plurality holds that the jury could not credit the paramedic's initial testimony that the complainant had identified her assailant her "boyfriend" because the paramedic later testified on cross-examination that the complainant had made no such identification to that paramedic, but may have made that identification to her

---

[66] *See Attachment: Edward, No. 14-18-00302-CR, 2020 WL 1480221 *3,4, Christopher, J., dissenting (emphasis added).*
[67] RR III, at 38, 39.
[68] *Price*, 502 S.W.3d at 281 (citing *Winfrey*, 393 S.W.3d at 767).

> partner, who did not testify at trial. This reasoning flies in the face of our standard of review, which provides that when there is a conflict in the evidence we must presume that the jury resolved the conflict in favor of the verdict.[69] The plurality has usurped the role of the jury by reaching a different resolution to this evidentiary conflict."[70]

The trial jury, not the appellate judges, is in the best position to assess the extent of the credibility of evidence. The record contains ample evidence of a dating relationship. Both the officer and the paramedic testified that the complainant claimed she had been beaten up by her "boyfriend".

Based upon that description, the jury could have reasonably concluded that the nature of the complainant's relationship with appellee was romantic or intimate.[71] Circumstantial evidence is just as probative as direct evidence and the record of circumstantial evidence is considerable as well. It is unnecessary for every fact to point directly and independently to the guilt of the accused, it is enough if the finding of guilt is warranted by the cumulative force of all the incriminating evidence.[72]

---

[69] *See Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) ("Trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side.").

[70] *See attachment: Edward, No. 14-18-00302-CR, 2020 WL 1480221 *4, Christopher, J., dissenting.*

[71] *See Villarreal v. State*, 286 S.W.3d 321, 328 (Tex. Crim. App. 2009) (upholding a conviction for violation of a protective order where the evidence showed that the complainant was the defendant's "girlfriend").

[72] *See Winfrey*, 393 S.W.3d at 768.

The records shows the appellee was arrested sitting on the complainant's bed in the victim's home, not running from the scene, as a stranger would be, or standing in the victim's doorway, as a neighbor or casual acquaintance would be, but rather, in one of the most intimate of spaces, the victim's bedroom. In addition to the victim's statements made witnesses, the jury could have reasonably inferred the victim had permitted appellee in her bedroom because their relationship had been ongoing and more than casual. Coupled with the statements of both the paramedic and the officer, there was ample evidence on this element of "dating relationship" for a reasonable juror to find it beyond a reasonable doubt.

Under a proper application of the law, the Appellate Court erred in ruling the conviction should be reversed and amended for insufficiency of evidence.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Court reverses the judgment of the Court of Appeals, and affirms Appellee's conviction.

Respectfully submitted,
Jack Roady
Criminal District Attorney
Galveston County, Texas

/s/ Holly Renee Magee

Holly Renee Magee
Assistant Criminal District Attorney
State Bar Number 12812300
600 59th Street, Suite 1001
Galveston, Texas 77551
Renee.magee@co.galveston.co.tx

CERTIFICATE OF SERVICE

The undersigned Attorney for the State certifies a copy of the foregoing brief was sent via e-filing email, to James DuCote, attorney for Duke Edward, on September 24, 2020.

/s/ Renee Magee
RENEE MAGEE
Assistant Criminal District Attorney
Galveston County, Texas

CERTIFICATE OF COMPLIANCE

The undersigned Attorney for the State certifies this brief is computer generated, and consists of 2,983 words.

/s/ Renee Magee
RENEE MAGEE
Assistant Criminal District Attorney
Galveston County, Texas

PLURALITY OPINION

Edward v. State, No. 14-18-00302-CR, 2020 WL 1480221 (Tex. App. –Houston [14th Dist.] March 26, 2020).

Reversed and Remanded and Plurality and Dissenting Opinions filed March 26, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00302-CR

DUKE EDWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 17-CR-1965

PLURALITY OPINION

A jury convicted appellant Duke Edward of felony assault of a family member as defined by section 71.0021(b) of the Texas Family Code. *See* Tex. Penal Code § 22.01(a)(1). The jury assessed appellant's punishment at sixty years in prison. *See id.* § 12.42(d) (establishing enhanced punishment of life in prison or a sentence between 25 and 99 years in prison if a "defendant has previously been finally convicted of two felony offenses . . . ."). In a single issue, appellant argues

that the trial court erred when it denied his motion for directed verdict because the State failed to prove he was in a "dating relationship" with the complainant. We agree with appellant that the State failed to present legally-sufficient evidence that he was in a dating relationship with the complainant. We do not reverse and render a judgment of acquittal however, because the jury, through its verdict, necessarily found every constituent element of the lesser-included offense of assault. We therefore reverse the trial court's judgment, remand the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of assault, and to hold a punishment hearing attendant to this post-reformation conviction.

BACKGROUND

The complainant called 9-1-1 to report a disturbance at her apartment. Officer Richard Hernandez with the La Marque Police Department was dispatched to the complainant's residence. When he arrived on the scene Hernandez found the complainant in a state of hysteria. The complainant appeared to have injuries on her face, and blood was present on both her shirt and face. The complainant indicated to Officer Hernandez that appellant was responsible for her injuries, providing the name "Duke Edward" when Officer Hernandez asked what was happening. Moments later, Officer Hernandez found appellant sitting on a bed in the back bedroom of the apartment. Officer Hernandez took appellant into custody and placed him in the back of his patrol car while the second responding officer remained with the complainant. The La Marque Fire Department ambulance arrived while Hernandez was still at his patrol car with appellant.

Officer Hernandez initially testified that the complainant told him that "her boyfriend beat her up" when he first made contact with her. During cross-examination, Officer Hernandez admitted that the complainant did not identify

appellant as her "boyfriend" on the portion of the body camera video[1] showing his initial contact with the complainant, or during the 9-1-1 recording. A short time later, the following exchange occurred between appellant's attorney and Officer Hernandez:

> Q. And, again, I am asking a very, very specific question. So please answer the specific question. On the video that we just watched - - on that particular video, at no point in time did [the complainant] ever state to you that [appellant] was her boyfriend; is that correct?
>
> A. I believe that is incorrect.
>
> Q. On that specific video that we just saw - - I'm not talking about - - I'm talking about specifically what we just watched. Did [the complainant] ever say on that particular video we just watched that [appellant] was her boyfriend?
>
> A. I believe that's correct.
>
> Q. Okay. So you're telling us from the portion we just saw, we heard her state, "That's my boyfriend, [appellant]"?
>
> A. I believe that's incorrect.
>
> Q. You believe that's incorrect she said that?
>
> A. I believe it's incorrect. She didn't identify him as her boyfriend.

Officer Hernandez's body-camera video that was entered into evidence during appellant's trial ended while the complainant, the responding police officers, and the responding EMS personnel were still inside the complainant's apartment.[2] Other evidence in the record, in addition to what appears on the body-

[1] The trial evidence includes the arresting officer's body camera video showing his arrival at the scene. It recorded the entire initial encounter with the complainant and then the appellant, the securing of the scene, the detention of appellant in the back of the police vehicle, and the officer's subsequent encounter with the arriving EMS personnel.

[2] The body-camera video shows that, in addition to Officer Hernandez, a second police officer and two EMS paramedics were on the scene.

camera video, indicates that the on-site investigation had not been completed when the body-camera video ended. This evidence includes Officer Hernandez's testimony that he encouraged the complainant to go with EMS personnel to the hospital, and that he gave the complainant a family violence form. Officer Hernandez also testified that the complainant signed the family violence form. The form was not admitted into evidence however.

Officer Hernandez was also asked during cross-examination if he later returned to the scene to speak with potential eyewitnesses or with the complainant's neighbors. Officer Hernandez admitted that he had not. Officer Hernandez was also not aware of any other officers from the La Marque Police Department going to the apartment complex to interview neighbors or witnesses. Officer Hernandez also admitted that he did not review the lease for the complainant's apartment or speak with the complex management to investigate whether they had any information about appellant's connection with the apartment lease.

On re-direct, the prosecutor clarified with Officer Hernandez that the body-camera video shown during his direct testimony was only an excerpt. The prosecutor then asked Officer Hernandez about his interaction with the EMS paramedics who arrived on the scene in an effort to clarify the relationship between the complainant and appellant. The following exchange then occurred:

> Q. So, again, did you advise EMS of the situation when they arrived?
>
> A. Yes, I did.
>
> Q. What did you advise them?
>
> A. I made contact with the medics. I told them the victim was upstairs with another officer. She needed to be checked out. She was pretty beaten up.

Q. Did you describe the relationship between the two?

A. I am really not sure of that, if I told them whether or not - - if I told them that he was her boyfriend or not.

Finally, the prosecutor asked Officer Hernandez:

Q. Why did you make the decision at that point to arrest [appellant]?

A. I made the decision based on the injuries that were observed on [the complainant] and her statement.[3]

Amanda Black, an emergency medical technician from the La Marque Fire Department, was also dispatched to the scene. Once on the scene, Black observed the complainant with multiple lacerations on her face, as well as multiple contusions on her forehead. According to Black, the complainant told her that "her boyfriend beat her up." Later, during cross-examination, Black had the following exchange with appellant's attorney:

Q. And you, yourself, have no firsthand knowledge of the relationship - - at least you didn't at the time of Duke Edward or [the complainant] at the time?

A. Firsthand? Her telling me?

Q. Yes, ma'am.

A. No, she didn't tell me.

Q. So any information regarding the relationship between [the complainant] and Duke Edward, you received from someone else, correct?

A. Correct.

Earlier in that same cross-examination, the following exchange occurred:

Q. When you arrived at the scene, as far as the information you first learned, was that information provided to you by Officer

[3] Since the detention of appellant is shown on the body camera video footage, the only statement in evidence was shown on the same body camera video.

Hernandez?

A. Yes.

Q. So the information regarding the relationship between [complainant] and [appellant], that information was provided to you by the officer?

A. Yes.

Q. As far as them being boyfriend and girlfriend?

A. Yes.

Q. And you wouldn't have placed that in the report without that information?

A. Most likely.

Q. Okay.

The State sought to admit the complainant's medical records related to the incident. The medical records initially reflected a dating relationship between appellant and the complainant, but appellant lodged a hearsay objection to their admission. The following exchange then occurred at the bench:

THE COURT: We don't know who said that. She said she didn't say it and her partner wrote it. The partner is not here. It's still objectionable with hearsay. I am sustaining his objection to hearsay. Despite the fact it's a business record, you can still object to hearsay records in there. She can't testify to --

PROSECUTOR: Yes, ma'am.

THE COURT: She can't testify she ever told her. So the complaining witness never communicated to her that was her boyfriend as stated in that record, right?

PROSECUTOR: Yes, ma'am.

THE COURT: Okay. So go ahead.

PROSECUTOR: If I may: It is hearsay within hearsay, I agree; but I have two levels of hearsay. I have a business records affidavit, which covers the entirety of it

and comes in for the purpose of medical diagnosis.

THE COURT: The relationship is not for purpose of medical diagnosis.

PROSECUTOR: I would say if she said that to the treating person, it would come in as that.

THE COURT: We don't have the treating person here. It's hearsay. You know what? I have made my ruling. You can take me up on appeal, whatever you want to do. I am sustaining about the hearsay. She can't testify she was told that. I don't know if you want to wait to bring another witness in. We can certainly wait before you want to proffer that into evidence.

Rather than wait for another witness, the State redacted all references to the relationship between appellant and the complainant, and the redacted documents were admitted into evidence.

Notwithstanding the very prominent cross-examination of the witnesses as to the basis of their knowledge of the dating relationship, and the inadmissibility of the medical record evidence as it relates to establishing the dating relationship, the State never called any other witnesses.

At the conclusion of the State's case, appellant moved for a directed verdict. Appellant argued that the State did not meet its burden to prove that a "dating relationship" existed between appellant and the complainant. The trial court denied appellant's motion. Appellant subsequently stipulated that he had previously been convicted of family violence assault. The jury found appellant guilty of felony assault against a family member. During the punishment phase of appellant's trial, the State offered evidence showing that appellant had been previously convicted of two felony offenses. Appellant pled true to both enhancement paragraphs in his indictment. The jury subsequently assessed appellant's punishment at sixty years in prison. This appeal followed.

ANALYSIS

I. Standard of review

A challenge to the denial of a motion for a directed verdict is a challenge to the legal sufficiency of the evidence. *Gabriel v. State*, 290 S.W.3d 426, 435 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In reviewing the sufficiency of the evidence to support a conviction, we must consider all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1973); *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012). In our review, we consider all of the evidence in the record, whether admissible or inadmissible. *Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013)). We measure the sufficiency of the evidence supporting a conviction by comparing the evidence presented during the trial to the elements of the offense as defined in a hypothetically-correct jury charge. *Hernandez v. State*, 556 S.W.3d 308, 312 (Tex. Crim. App. 2017). The jury is the sole judge of the credibility of witnesses and the weight afforded their testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may choose to believe or disbelieve all or a portion of a witness's testimony, and we presume that the jury resolved any conflicts in the evidence in favor of the prevailing party. *See Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016) ("We defer to the jury's finding when the record provides a conflict in the evidence."); *Jackson v. State*, 495 S.W.3d 398, 405 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish

guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Evidence is sufficient if the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Further, the jury's verdict will be upheld unless "a rational factfinder must have had a reasonable doubt as to any essential element." *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009).

II. The record contains legally insufficient evidence that appellant and the complainant were in a dating relationship.

A person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." Tex. Penal Code § 22.01(a)(1). The offense is generally a Class A misdemeanor, but is heightened to a third-degree felony if the offense is committed against a person with whom the defendant has a "dating relationship." *See id.* § 22.01(b)(2); Tex. Fam. Code § 71.0021(b). The Texas Family Code defines "dating relationship" as a "relationship between individuals who have or had a continuing relationship of a romantic or intimate nature." Tex. Fam. Code § 71.0021(b). A casual acquaintanceship or ordinary fraternization in a business or social context does not however, constitute a "dating relationship." *Id.* § 71.0021(c). The Family Code provides that "the existence of such a relationship shall be determined based on consideration of: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship." *See id.* § 71.0021(b). The difference between a conviction for misdemeanor assault and a conviction for third-degree felony assault of a family member turns on whether there is sufficient evidence of a "dating relationship" between appellant and the complainant. Tex. Penal Code § 22.01(b)(2).

Appellant argues that the evidence presented by the State was not sufficient for a rational factfinder to conclude beyond a reasonable doubt that appellant was in a "dating relationship" with the complainant because the State failed to present any evidence of the three factors mentioned in section 71.0021(b) of the Family Code. We agree with appellant.

On appeal, the State points to what it labels circumstantial evidence that appellant was in a "dating relationship" with the complainant. This evidence incudes Officer Hernandez's testimony that he found appellant in the bedroom of the complainant's apartment, a location that the State argues creates an inference of intimacy between the complainant and appellant. Next, the State points to the fact that complainant and appellant were alone with each other in the complainant's apartment when Officer Hernandez arrived on the scene. The State asserts that this reinforces a determination that they were in a "dating relationship." We conclude that, based on this evidence, a factfinder could do no more than speculate on the existence of a dating relationship which is insufficient to support a conviction. *See Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (stating that, under legal sufficiency standard, "evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes a reasonable doubt."); *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007) (defining speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented" and stating that it is insufficient to support a criminal conviction); *Prestiano v. State*, 581 S.W.3d 935, 942 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (stating that a factfinder is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt).

The State next suggests that the testimony of Officer Hernandez and Amanda Black, one of the paramedics dispatched to the scene, provides direct evidence of the complainant and appellant's relationship status. Officer Hernandez did initially testify that the complainant told him that her boyfriend beat her up and she identified appellant as the person who assaulted her. Black testified the complainant told her that "her boyfriend beat her up."[4] The jury, however, is not permitted to disregard Officer Hernandez's later testimony, given after viewing the body-camera video that had been admitted into evidence, admitting that the complainant did not identify appellant as her boyfriend, or Black's admission during cross-examination that the complainant did not tell her that appellant was her boyfriend. Additionally, the body-camera video is in the appellate record and a review of the video establishes that the complainant never identified appellant as her boyfriend during the video. Thus, we conclude that Officer Hernandez's and Black's testimony cannot support a determination that appellant and the complainant were in a dating relationship. *See Britain v. State*, 392 S.W.3d 244, 249 (Tex. App.—San Antonio 2012, *aff'd Britain*, 412 S.W.3d at 523)) ("Although the jury is permitted to draw appropriate conclusions and inferences from the evidence, it was not rational for the jury to conclude the requisite knowledge based on the record before us."). We therefore sustain in part appellant's issue on appeal.

Concluding legally insufficient evidence supports appellant's conviction for dating-relationship assault does not end our inquiry however. In this situation the Court of Criminal Appeals has directed this court to answer two questions: "(1) in the course of convicting the appellant of the greater offense, must the jury have

[4] Appellant lodged hearsay objections to both Hernandez's and Black's testimony. The trial court overruled both objections and appellant has not challenged those decisions in this appeal.

necessarily found every element necessary to convict the appellant for the lesser-included offense; and (2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?" *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014). If the answer to both questions is yes, then we are required "to avoid the unjust result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense." *Id.*

In this case, appellant has challenged the sufficiency of the evidence only for the aggravating element of the charged offense, the existence of a dating relationship with the complainant. *See* Tex. Penal Code § 22.01(b)(2) (elevating assault offense from a Class A misdemeanor to a third-degree felony if the defendant commits the offense against a person with whom the defendant has a "dating relationship"). He has not challenged the sufficiency of the evidence supporting any of the other elements of the dating-relationship assault offense, which are the same as for misdemeanor assault. *See* Tex. Penal Code § 22.01(a)(1) (A person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another"). Having examined the record evidence summarized above, we conclude that the evidence is legally sufficient to support a conviction for misdemeanor assault. *See Tyler v. State*, 563 S.W.3d 493, 498–99 (Tex. App.—Fort Worth 2018, no pet.) (concluding evidence legally sufficient to support misdemeanor assault conviction). We must therefore, reform the judgment to reflect a conviction for the lesser-included offense of misdemeanor assault. *Thornton*, 425 S.W.3d at 300.

CONCLUSION

Having determined that the evidence is legally insufficient to support appellant's conviction for dating-relationship assault, and that the evidence is

legally sufficient to support a conviction for the lesser-included offense of misdemeanor assault, we reverse the trial court's judgment, remand the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of assault, and to hold a punishment hearing attendant to this post-reformation conviction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Bourliot, and Zimmerer (Christopher, J. dissenting, Bourliot, J. concurring without opinion).
Publish — TEX. R. APP. P. 47.2(b).

DISSENTING OPINION

Edward v. State, No. 14-18-00302-CR, 2020 WL 1480221 (Tex. App. – Houston [14th Dist.] March 26, 2020).

Reversed and Remanded and Plurality and Dissenting Opinions filed March 26, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00302-CR

DUKE EDWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 17-CR-1965

DISSENTING OPINION

This is an uncomplicated case that has been needlessly complicated by a misapplication of the standard of review.

I. The evidence is legally sufficient to support the conviction.

The prosecution had the burden of proving three essential elements: (1) appellant assaulted the complainant by intentionally, knowingly, or recklessly causing her bodily injury; (2) appellant and the complainant were involved in a

dating relationship; and (3) appellant had previously been convicted of another assault against a family member or against a person whom he was dating. *See* Tex. Penal Code § 22.01(b)(2)(A).

The first element was established by the 911 tape, where the complainant reported that she had just been beaten up, and where she identified appellant by name as her assailant. Also, the officer's body cam video and the photographs from the scene confirmed that the complainant had suffered multiple injuries to her face. Based on the collective force of this evidence, the jury could have reasonably concluded that appellant intentionally assaulted the complainant.

Turning next to the second element, the prosecution had to show that appellant and the complainant were in a "continuing relationship of a romantic or intimate nature." *See* Tex. Fam. Code § 71.0021(b). The existence of such a dating relationship must be based on the consideration of (1) the length of the relationship, (2) the nature of the relationship, and (3) the frequency and type of interaction between the persons involved in the relationship. *Id.*

The record contains ample evidence of a dating relationship. Both the officer and the paramedic testified that the complainant claimed that she had just been beaten up by her "boyfriend." Based on that description, the jury could have reasonably concluded that the nature of the complainant's relationship with appellant was romantic or intimate. *See Villarreal v. State*, 286 S.W.3d 321, 328 (Tex. Crim. App. 2009) (upholding a conviction for violation of a protective order where the evidence showed that the complainant was the defendant's "girlfriend").

There is no direct evidence regarding the length of the complainant's relationship with appellant, or of the frequency and types of their interactions, but a conviction does not require direct evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence is just as probative as direct

evidence. *Id.* And the record here contains circumstantial evidence of these other considerations. In particular, the record shows that appellant was arrested when he was sitting on the complainant's bed. Because the bedroom is one of the most personal places in the entire home, the jury could have reasonably inferred that the complainant had permitted appellant in her bedroom because their relationship had been ongoing and more than just a casual acquaintance.

As for the final element, the parties stipulated that appellant had a prior conviction for assaulting a family member. Thus, there is legally sufficient evidence for each essential element of the offense, and this court should have held that the prosecution carried its burden of proof beyond a reasonable doubt.

II. The plurality has failed to examine the evidence in the light most favorable to the verdict.

In reaching the opposite conclusion that the evidence is insufficient to support the conviction, the plurality asserts that the jury "could do no more than speculate on the existence of a dating relationship." This assertion is wrong because speculation does not occur if the jury is capable of "considering other facts and deducing a logical consequence from them." *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). And here, the officer testified that he gave the complainant a "family violence form" when he left the scene. This testimony—which the plurality wholly disregards in its sufficiency analysis—bolsters the evidence that the complainant identified appellant as her "boyfriend" and supports a logical inference that she informed the officer that she and appellant were involved in a dating relationship. *See* Tex. Fam. Code § 71.004(3) (providing that "family violence" includes the legal definition for "dating violence").

The plurality also asserts that the jury was required to disregard the officer's initial testimony that the complainant had identified her assailant as her "boyfriend"

because the officer subsequently admitted that the complainant had made no such identification on the body cam video. This analysis fails to recognize that the body cam video did not capture the entire interaction. The video was less than fifteen minutes in length, and it ended when the officer was still in the complainant's apartment, as he was documenting her injuries. The jury could have reasonably concluded that the complainant identified appellant as her boyfriend after the body cam had stopped recording.

In a similar point, the plurality holds that the jury could not credit the paramedic's initial testimony that the complainant had identified her assailant as her "boyfriend" because the paramedic later testified on cross-examination that the complainant had made no such identification. This reasoning flies in the face of our standard of review, which provides that when there is a conflict in the evidence, we must presume that the jury resolved the conflict in favor of the verdict. *See Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) ("The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side."). The plurality has usurped the role of the jury by reaching a different resolution to this evidentiary conflict.

Based on the foregoing, I would affirm appellant's conviction in its entirety. Because the court does not, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Bourliot, and Zimmerer. (Zimmerer, J., plurality). (Bourliot, J., concurring without opinion).

Publish — Tex. R. App. P. 47.2(b).

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Heather Gruben on behalf of Holly Magee
Bar No. 12812300
heather.gruben@co.galveston.tx.us
Envelope ID: 46556830
Status as of 9/25/2020 9:37 AM CST

Associated Case Party: Duke Edward

Name	BarNumber	Email	TimestampSubmitted	Status
James Ducote		james@ducotelawfirm.com	9/24/2020 5:03:24 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	9/24/2020 5:03:24 PM	SENT